No. 15032.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Wayne A. Parkinson, an individual Trading and Doing Business as Glandular Products Company and Dybutol Company, and Allen H. Parkinson, an Individual Trading and Doing Business as Tide Mailing Service, and Margaret M. Willis,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

The Power to Order Restitution Is Not Impaired by Appellees' Resourcefulness in Conjuring Up Extreme Applications of That Remedy.

Appellees devote several pages of their brief (pages 4-6) to a warning that restitution, once established as an ancillary power in an injunction suit under 21 U.S.C. 332(a), may be invoked in the presence of "technical and inadvertent" violations of the Federal Food, Drug, and Cosmetic Act. There are premonitory visions of a judi-

cial inundation with restitution suits based upon such offenses as the serving of colored margarine in public eating places in squares rather than in triangular shape.

This type of argument has been aptly termed "the parade of the imaginary horribles". In *United States v. Sullivan,* 332 U. S. 689, 694 (1948), the Supreme Court emphatically rejected an analogous argument in another food and drug case:

> ". . . It is even prophesied that, if Section 301(k) is given the interpretation argued by the Government, it will later be applied so as to require retail merchants to label sticks of candy and sardines when removed from their containers for sale.
>
> "The scope of the offense which Congress defined is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its provisions which relate to food, cosmetics, and the like. *There will be opportunity enough to consider such contingencies should they ever arise.* It may be noted, however, that the Administrator of the Act is given rather broad discretion—broad enough undoubtedly to enable him to perform his duties fairly without wasting his efforts on what may be no more than technical infractions of the law." [Emphasis added.]

Clearly the Courts do not consider the executive branch of the Government to be wantonly irresponsible. See, also, *Willapoint Oysters, Inc. v. Ewing, Administrator,* 174 F. 2d 676, 696 (C. A. 9, 1949), cert. den. 338 U. S. 860. Moreover, an equity court called upon to exercise its inherent power to issue an order of restitution may always, within its discretion, refuse to issue such an order.

Nor does the jurisdictional authority of an equity court depend upon whether it will eventually grant the relief

sought. This principle was illustrated in *Standard Fashion Co. v. Siegel-Cooper Co., et al.,* 51 N. E. 408, 157 N. Y. 60 (1890). The plaintiff had brought suit for specific performance of a contract. Defendant had demurred on the ground of failure to state a cause of action. On page 410, the Court said:

> "A court of equity has jurisdiction of such actions . . . A complete cause of action is . . . alleged, and the only reason for not awarding general relief to the plaintiff is that its nature is so complicated as possibly to require a multiplicity of orders by the court in its efforts to superintend the details of an extensive and peculiar business. *This fact does not deprive the court of jurisdiction, but justifies a refusal, in its sound discretion to exercise it. It is the difficulty of enforcing, not of rendering, judgment that causes it to hesitate.* Upon the facts before us, it is in the power of the court to enforce the agreement the same as in the case of railroad contracts, but the difficulties attending the enforcement are so great that the court would ordinarily refuse to undertake it, *as there is no public interest involved.*" [Emphasis added.]

Thus (1) the possibility that an equity court may eventually refuse to act does not deprive it of jurisdiction to act, and (2) an equity court is more likely to grant relief despite difficulties in enforcement where to do so would promote the public interest. See *Virginian Railway Co. v. System Federation No. 40,* 300 U. S. 515, 552 (1937).

Appellees would of course prefer to have the Court focus attention upon pats of colored oleomargarine in square shapes rather than upon the extravagant and misleading representations which induced the purchase of *their* remedies.

II.

The Issue Before the Court May Not Be Decided in a Legal Vacuum.

Appellees argue (pp. 9-12) that the issue now before the Court is "a strictly legal one" entirely independent of the underlying facts and that the Government's brief was designed "to inflame and prejudice the Court" by describing the factual background "in lurid detail."

The factual background set forth in the Government's opening brief is taken from the Complaint for Injunction. [R. 3-17.] Moreover, it was agreed in paragraph (3) of the Stipulation and Order Re Issue of Restitution [R. 71-72], that for the purpose of deciding the issue now before the Court, "all of the allegations of the Complaint for Injunction, as well as the contents of and exhibits attached to the affidavits filed on behalf of the plaintiff, are true."

Appellees object to the relevance of such facts apparently because the facts do not present appellees in a very favorable light. This is hardly a valid ground for objection. After all, the facts are of appellees' own making.

It is not difficult to understand appellees' preference that the facts in this case be glossed over entirely. Yet this Court is not being asked to decide a moot legal question of academic interest, divorced from all facts. The issue has arisen out of an adversary proceeding and the Court's decision will have great significance for the litigants and for the public. Under these circumstances, we believe it was proper to present the stipulated facts to the Court forcefully and, we submit, fairly.

III.

The Restitution Power Under the Fair Labor Standards Act of 1938.

We have discussed this point in some detail in our opening brief. On page 29 of their brief, appellees quote from "a most revealing statement" made by Representative Lucas in the House of Representatives in 1949, in the course of a debate regarding proposed amendments of the Fair Labor Standards Act of 1938. In part, Representative Lucas said:

> ". . . but they are taking the power to bring restitution suits in the form of injunctions, *something that the Congress never intended when it originally passed this act.* . . ." [Emphasis added.]
>
> [Cong. Record, 81st Cong., 1st Sess., p. 11002 (Aug. 8, 1949).]

Whether Congressman Lucas was *then* (1949) speaking for the entire Congress which had enacted the Fair Labor Standards Act *in 1938* or even for the Congress which was considering amendments to that Act *in 1949,* is at least questionable. Thus on page 10995 of the Congressional Record of August 8, 1949, Congressman Sabath observed:

> "I understand that the gentleman from Texas [Mr. Lucas], *who is serving his second term, is setting himself up above the Committee on Education and Labor,* and has broadly publicized the fact that he will offer the so-called Lucas bill as a substitute." (Emphasis added.)

See also page 10998, where Congressman Lesinski, the Chairman of the Committee on Education and Labor, describes unsuccessful efforts to work out an agreement with Congressman Lucas (also a member of that Com-

mittee) and makes this statement about the Lucas substitute bill in asking the House to reject it.

> "The Lucas bill would remove more than 1,000,000 workers who are now covered from the protection of the wage-and-hour law. The Lucas bill will tie the minimum wage to a cost of living index—a plan which even the United States Chamber of Commerce has condemned as unsound. And finally, the Lucas bill, by its introduction of many new terms into the law will create great uncertainty which can only be settled by the Supreme Court decisions after years of litigation."

The Lucas bill did not pass.

As we have shown in our opening brief (pp. 36-38), Congress was not "alarmed" by the appellate court decisions which ordered restitution under the Fair Labor Standards Act in injunction suits brought by the Administrator. Congress in fact agreed that the Courts should have the authority to order restitution at the instance of the Administrator and set up a special procedure for that purpose, independent of injunction suits brought by the Administrator.

On page 29 of their brief, appellees quote from a statement by Senator Pepper speaking for the majority of Senate conferees regarding the then proposed amendments to the Act, which embodied the special restitution procedure and simultaneously divested the Courts of power to order restitution *in injunction suits under that Act*. Senator Pepper declared:

> "It is intended to deprive the courts of jurisdiction to exercise *their equitable powers to order back wages* in purely injunctive actions, as was done in *McComb v. Scerbo*. . . ." [Emphasis added.]

This confirms our argument that Congress recognized that federal Courts have the power to order restitution in statutory injunction suits, unless that power is expressly curtailed by statute. It is settled that Congress may deprive district courts of jurisdiction even with respect to pending cases. *Bruner v. U. S.*, 343 U. S. 112, 114-117 (1952); *U. S. v. Kelly*, 97 Fed. 460 (C. A. 9, 1899). But until Congress has expressly divested a Court of jurisdiction previously granted, the Court is free to exercise such jurisdiction.

If, as we contend, the federal district courts acquired jurisdiction under the Federal Food, Drug, and Cosmetic Act to order restitution in injunction suits brought under 21 U. S. C. 332 (a), they still have such jurisdiction since Congress has not amended that statute to withdraw such jurisdiction. The amendment of similar language in the injunction provisions of the Fair Labor Standards Act to divest the Courts of power to order restitution in statutory *injunction* suits brought under *that* statute simply strengthens our position that the power to order restitution exists under the Federal Food, Drug, and Cosmetic Act which has not been amended in this regard.

IV.

A Court of Equity Can Utilize the Restitution Remedy Without a Congressional Directive.

Throughout their brief, appellees paint a picture of well-nigh insurmountable problems that would confront a court attempting to apply the remedy of restitution in injunction suits under 21 U.S.C. 332(a). According to appellees, an equity court would flounder hopelessly in the face of such problems which, they contend, could be dealt with properly only by Congress. [Appellees' Brief, page 35.] They urge, therefore, that the present issue be presented to Congress rather than to the Courts.

This argument—"go to Congress"—is routinely made by a defendant who does not like the proposed application of a law to himself and professes to find an ambiguity or statutory defect which, he suggests, had best be resolved or remedied by Congress.

If the Court has the power to grant the relief sought here, it is not necessary to go to Congress to confirm that power. Moreover, a court of equity can mould its decree in any manner that will do complete justice to all concerned in the particular case. By the flexibility of its decree, a court of equity could in this case resolve all of the questions raised by the defendants without undue difficulty.

Appellees applaud the divestiture orders issued by equity courts in injunction suits under the Sherman Act. [Pages 32-33.] Noteworthy, however, is the failure of that statute to prescribe a procedure for affecting divestiture, or even to mention divestiture. Yet the courts have successfully carried out divestiture under the injunction provisions of the Sherman Act [15 U.S.C. 4] in factual situations far more complex than could ever be presented by restitution prayers in injunction suits under the Federal Food, Drug, and Cosmetic Act.

A case in point is *Schine Chain Theatres, Inc. v. United States,* 334 U. S. 110 (1948). On page 126, the Supreme Court discusses the divestiture provisions of the District Court's decree, thereby giving some indication of the magnitude of the problems which had to be resolved by the District Court:

> "The District Court included in its decree a divestiture provision adjudging that appellant companies be 'dissolved, realigned, or reorganized in in their ownership and control so that fair competi-

tion between them and other theatres may be restored and thereafter maintained.'[1] The parties subsequently submitted various plans and after hearings the one submitted by the Department of Justice was approved with modifications. The plan does not provide for the dissolution of the Schine circuit through the separation of the several affiliated corporations . . . It keeps the circuit intact in that sense but requires Schine to sell certain theatres. The plan requires Schine to sell its interest in all but one theatre of its selection in each of 33 towns, all but two in each of four larger towns, and two of four theatres in Rochester, New York. Schine is to be divested of more than 50 of its theatres. The towns affected are over 40 out of the 70-odd in which Schine is operating . . .

"The decree also dissolves the pooling agreements. A trustee is appointed to make the sales which are ordered. Schine is prohibited from acquiring any financial interest in additional theatres, 'except after an affirmative showing that such acquisition will not unreasonably restrain competition' . . ."

While the Supreme Court felt that the District Court should make certain additional findings and for that reason set aside the divestiture provisions, it did not suggest that the District Court refrain from ordering divestiture because Congress had not enacted a procedure

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[1]In the District Court opinion, 63 Fed. Supp. 229, the lower court had indicated the mechanics by which it eventually arrived at a divestiture order.

Page 242:

"and that the determination of the question of the dissolution, re-alignment or reorganization of the parties aforesaid and the method to be employed in the accomplishment of the same *be left to be fixed by this court after further consideration with the parties.*" [Emphasis added.]

to govern divestiture. On the contrary, it manifested approval of judicial resort to the theory of divestiture, stating on page 128:

> "Like restitution it [divestiture] merely deprives a defendant of the gains from his wrongful conduct. It is an *equitable remedy* designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." [Emphasis added.]

Appellees note in their brief on page 31 that restitution under 21 U.S.C. 332(a) would not be subject to a statute of limitations. On page 23 of their brief they assert that "if the Government's present argument is valid, the restitution could be awarded for every dollar's worth of sale of an offending product, since 1906, if a product had been known that long." This is patently absurd. The ancient doctrine of laches is the equitable substitute for a statute of limitations and is based on the injustice that might result from the enforcement of stale and antiquated claims. See 30 C.J.S., §113, pages 523-526.

The statute in question, 21 U.S.C. 332(a), authorizes district courts "to restrain violations" of 21 U.S.C. 331. On page 22 of their brief, appellees state that Section 302(a)—[21 U.S.C. 332(a)]—"calls into play only so much of the total potentialities of equity as a concept, as is necessary to restrain violations." But as Judge Woodrough said in his concurring opinion in *Walling v. Miller*, 138 F. 2d 629, 633 (C. A. 8, 1943):

> ". . . I think *the powers* vested in the district courts by the Fair Labor Standards Act *to restrain violations of its provisions include the power to enter mandatory injunctions at the instance of the Administrator requiring employers to pay up any deficiencies*

> they are shown to be unlawfully withholding from employees in violation of the Act at the time of the entry of decree against the employer." [Emphasis added.]

This viewpoint—that the equitable power "to restrain violations" includes the power to order restitution—became the basis for the decisions in *Walling v. O'Grady*, 146 F. 2d 422, 423 (C. A. 2, 1944), and *McComb v. Frank Scerbo & Sons*, 177 F. 2d 137, 138, 139 (C. A. 2, 1949). Coupled with *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946), they squarely support our position that Congress has already conferred upon the district courts the power to order restitution in statutory injunction suits brought under 21 U.S.C. 332(a).

Appellees concede that the statute here in question, by empowering the district courts "to restrain violations," confers equity jurisdiction upon those courts. [Appellees' Brief, page 22.] Their contention, however, is that such jurisdiction is limited. But the essence of the Fair Labor Standards cases and the Rent Control cases which we have previously discussed, is that where Congress vests power in the district courts to restrain acts which it has prohibited, it thereby authorizes those courts to employ all of their traditional equitable powers to effectuate that purpose and to achieve complete justice. This rule has been stated as follows:

> ". . . The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great prin-

ciples of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction' . . ."

Porter v. Warner Holding Co., 328 U. S. 395, 398 (1946).

Plainly, he who would deny to an equity court the right to resort to any of the great principles of equity, has the burden of establishing an affirmative prohibition. No such prohibition appears in the Federal Food, Drug, and Cosmetic Act.

V.

An Equity Court's Power to Order Restitution Does Not Depend Upon Continuous Exercise.

Appellees contend that the absence of frequent prayers for restitution under the Federal Food, Drug and Cosmetic Act demonstrates the non-existence of the power to issue such an order. [Pages 19-21.] Appellees speak of "the complete silence of so active and so alert an agency as the Food and Drug Administration for 13 years." [Page 20.]

The Federal Food, Drug, and Cosmetic Act was approved on June 25, 1938, but pursuant to Section 902(a) it did not become effective until June 25, 1939. [52 Stat. L. 1059.] Operating with a small enforcement staff, the Food and Drug Administration has consistently given first priority to products involving danger to health. Second priority has gone to filthy products. Third priority has included economic cheats and frauds.

Effective enforcement of the Act of 1938 called for the early judicial interpretation of a number of fundamental legal questions, such as the criminal responsibility of corporate officers for adulterated drugs shipped in the name

of the corporation, *United States v. Dotterweich,* 320 U. S. 277 (1943); the scope of the danger to health provisions, *United States v. 62 Packages . . . Marmola Prescription Tablets,* 48 F. Supp. 878 (1943), aff'd 142 F. 2d 107 (C. A. 7, 1944), cert. den. 323 U. S. 731; the validity of the food standard program, *Quaker Oats Co. v. Federal Security Administrator,* 129 F. 2d 76 (C. A. 7, 1942), reversed *Federal Security Administrator v. Quaker Oats Co.,* 318 U. S. 218 (1943); the criminal responsibility of a pharmacist who dispenses prescription drugs without a prescription, *United States v. Sullivan,* 67 F. Supp. 192 (M. D. Ga., 1946), reversed 161 F. 2d 629 (C. A. 5, 1947), reversed 332 U. S. 689 (1948); the validity of regulations excluding dangerous coal tar colors from cosmetics, *United States v. 3-7/12 Dozen Packages . . . Nu-Charme Perfected Brow Tint,* 61 F. Supp. 850 (W. D. La., 1945), aff'd *Byrd v. United States,* 154 F. 2d 62 (C. A. 5, 1946); whether the Government can prevail when there is some conflict in medical opinion, *Research Laboratories, Inc. v. United States,* 167 F. 2d 410 (C. A. 9, 1948), cert. den. 335 U. S. 843; whether the Government must establish that filthy or decomposed food is also "unfit for food," *United States v. 1851 Cartons . . . Whiting Frosted Fish,* 146 F. 2d 760 (C. A. 10, 1945).

As a practical matter, before the Government could seek restitution under the Federal Food, Drug, and Cosmetic Act in an injunction suit involving misrepresentations of a nature which would justify restitution, it was necessary to establish the rule of law that literature shipped in interstate commerce separately from drugs to which it relates constitutes the "labeling" of such drugs within the meaning of 21 U.S.C. 321(m). This is because the statute declares that a drug is misbranded if

its *labeling* is false or misleading in any particular. [21 U.S.C. 352(a).] In practically every instance where restitution would be sought, including the present case, the distributor ships the literature bearing the false and misleading statements *separately* from the drug. It was not until *November 22, 1948,* that this question of law was settled favorably to the Government's viewpoint. *Kordel v. United States,* 335 U. S. 345, and *United States v. Urbuteit,* 335 U. S. 355.

In the meantime, it will be recalled that other governmental agencies were involved in litigation to determine the inherent power of an equity court to order restitution in a statutory injunction suit. While the Supreme Court on June 3, 1946, decided that such power existed, *Porter v. Warner Holding Co.,* 328 U. S. 395, both lower courts had held *contra,* 60 F. Supp. 513 (D. Minn., 1944) and 151 F. 2d 529 (C. A. 8, 1945). See also the Fair Labor Standards cases, *Walling v. O'Grady,* 146 F. 2d 422 (C. A. 2, 1944) and *McComb v. Frank Scerbo & Sons,* 177 F. 2d 137 (C. A. 2, 1949).

The Federal Food, Drug, and Cosmetic Act authorizes three different sanctions: *seizure actions* against the offending goods [21 U.S.C. 334(a)]; *criminal actions* against those who are responsible for the doing of prohibited acts [21 U.S.C. 333]; and *injunction actions* [21 U.S.C. 332(a)]. Since the effective date of the Act in 1939, there have been approximately 39,000 *seizure and criminal* actions but only 300 *injunction* suits brought under the Act. The statutory injunction is generally considered a drastic remedy which is not invoked except under impelling circumstances. Many of the injunction suits which are brought deal with violations where restitution would not be feasible. As appellees say on page 13 of

their brief, there are "many situations where the proposed remedy [restitution] would be impossible, impractical or inequitable . . ." The Government would not ask the district court to issue a futile order and would seek restitution only where it appeared practicable and equitable. A prayer for restitution would never be a form paragraph to be routinely added to Complaints for Injunction filed under 21 U.S.C. 332(a).

Less than 2 years after the *Kordel* case, *supra,* had created a proper foundation for a restitution prayer, an Amended Complaint for Injunction including such a prayer was filed in *United States v. Mytinger & Casselberry, Inc., et al.* (S. D. Calif. No. 10344-BH, October 23, 1950). Appellees' counsel here was one of the defense attorneys in that case. That suit was but a segment of extensive litigation discussed in the law review articles cited in our opening brief on page 50, footnote 12. In the final disposition of that litigation, the restitution prayer was not ruled upon.

The Government's position on restitution in that case has been the subject of considerable comment in legal and trade journals concerned with food, drug, and cosmetic regulation. In the *Note* entitled "Restitution in Food and Drug Enforcement," 4 Stan. L. Rev. 519-536 (1952), the author cites letters which the Stanford Law Review received from responsible governmental officials regarding the remedy of restitution. In footnote 85 on page 531, the following is quoted from a letter written by the Assistant General Counsel in charge of the Food and Drug Division of what is now the Department of Health, Education, and Welfare:

> "A prayer for restitution in the circumstances of [the] *Mytinger & Casselberry* case seemed appro-

> priate . . . As to our future policy, I can only say that where a situation similar to that case prevails, we shall again give consideration to asking for restitution."

And in the same footnote, the following is quoted from a representative of the Department of Justice:

> "In summary, I feel that the government may seek restitution in future cases where the circumstances are generally similar to those which prevailed in the *Mytinger & Casselberry* case."

The mere expression of these views may well have deterred many promoters from making extravagant therapeutic claims. At any rate, less than 2 years later, the Government on February 26, 1954, filed the Complaint for Injunction in this case, including a prayer for restitution. The Government, we submit, has acted with reasonable circumspection and diligence in pressing its position on restitution under 21 U. S. C. 332(a). Even before enactment of the statute, the Chief of the Food and Drug Administration said[2] of a similar provision in one of the earlier bills:

> "This section . . . permits the consideration of the whole question on an equitable basis, because proceedings under it would be instituted in courts of equity."

This, in a sense, is the heart of the Government's case. The instant proceedings arose in a court of equity where every prayer for relief should be considered on an equitable

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[2]See our opening brief, pages 22-23.

basis and where the court may, in its discretion, make full use of its broad inherent powers to accomplish a just result in the public interest.

Respectfully submitted,

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